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SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION

9 Carl Alexander Wescott,) Case No. 17-cv-06271-EDL
10 Plaintiff)
11 ----- versus -----) **PLAINTIFF'S MOTION FOR DEFAULT**
12 Eric Reisner) **JUDGMENT**
13 Defendants) Hearing Date: January 9th, 2018
14 And DOES 1 to 20,) Hearing Time: 10 am
15 Defendants)

16
17 Pursuant to Federal Rules of Civil Procedure 16 (f) (1); Federal Rule of Civil Procedure
18 55 (a) and 28 USC 1927 4.2; and Rule 55 the Plaintiff hereby moves for a Default Judgment
19 against Defendant Eric Reisner for failing to appear at successive Pretrial Conferences and for
20 the imposition of costs and sanctions against the Defendant, pursuant to Rule 16 (f) (2).. In
21 support of his Motion, the Plaintiff offers this concise Memorandum of Points & Authorities.

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24 1. Introduction

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26 This case is about fiduciary breach, embezzlement, fraud and the misappropriation of trade
27 secrets arising out of a contract to develop property in Nicaragua. The Plaintiff trusted Defendant
28 Reisner ("Reisner") with substantial funds including the purchase of property with those funds

1 and legal control/power of attorney over that property. Reisner misused the latter to fraudulently
 2 sell valuable real property at fire sale prices and convert the funds. Reisner left the country and
 3 absconded to Singapore with the proceeds of his theft and has only been recently located by the
 4 Plaintiff. Conjunctively, the Plaintiff entrusted Reisner with valuable trade secrets related to the
 5 valuation, value optimization, venue selection, marketing, and financing of international real
 6 estate. Reisner misappropriated the Plaintiff's trade secrets.

8 After initially answering, Reisner has entirely failed to defend or to cooperate with the
 9 management of this case including, without limitation: a.) failing to participate or appear at case
 10 management conferences, b.) failing to cooperate, exchange 26.1 disclosures or otherwise appear
 11 before this Court in connection with the initial exchange of discovery and c.) filing to follow
 12 court orders to file paperwork and cooperate on paperwork. This pattern of abdicating his
 13 responsibilities before this Court subjects Reisner to a Default Judgement under Federal Rule of
 14 Civil Procedure 16 (f) (A) thru (C) for persistently failing to appear and/or cooperate in the case
 15 management and case scheduling process.

19 2. This Court is Empowered to Enter a Default Judgment

20 Federal Rule of Civil Procedure 16 (f) states, in pertinent part:

22 (f) SANCTIONS.

23 (1) *In General*. On motion or on its own, the court may issue any just
 orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or
 its attorney:

- 24 (A) fails to appear at a scheduling or other pretrial conference;
- 25 (B) is substantially unprepared to participate—or does not participate
 in good faith—in the conference; or
- 26 (C) fails to obey a scheduling or other pretrial order.

27 Sanctions under Rule 37 (b) (2) (A) (ii) include:

- 28 (vi) rendering a default judgment against the disobedient party;

1 The Court, in such a case, *must* (in the language of the Rule) award sanctions and costs
 2 unless the party can justify his noncompliance. See Rule 16 (f) (2).

3 The Court is not only empowered to enter a Default Judgment in this case, such a course is
 4 almost compelled by the seriousness of Reisner's infractions:
 5

6 When the Court enters a case management order under Federal Rule of Civil
 7 Procedure 16, it is not spit balling ideas around a conference room table. Instead,
 8 the Court is entering dates (that, by the way, the parties had substantial input in
 9 determining) to help ensure the orderly proceeding of the matter within a very
 10 busy district court. See Rule 16 1983 Advisory Committee Notes ("[A]t some
 11 point both the parties and pleadings will be fixed."); *Forstmann v. Culp*, 114
 F.R.D. 83, 85 (M.D.N.C. 1987) (scheduling order is not a frivolous piece of
 paper, idly entered, which can be cavalierly disregarded by counsel without peril).
 Cited in *McCann v. Cullinan*, No. 11 CV 50125 (W.D. Ill. 2011).

12 Judge Johnston pointed out, in the course of the same Opinion:

13 Counsel must calendar and meet dates. And if counsel is going to miss a deadline,
 14 then counsel should file a motion seeking an extension *before* the deadline has
 15 passed. See, e.g., *Keeton v. Morningstar, Inc.*, 667 F.3d 877, 883 (7th Cir. 2012);
 16 *Johnson v. Gudmondsson*, 35 F.3d 1104, 1111 (7th Cir. 1994); *Ammons-Lewis v.*
 17 *Metropolitan Water Reclamation District*, 2012 U.S. Dist. LEXIS 170976, at *4-5
 (N.D. Ill. Nov. 30, 2012) (filing before expiration of deadline entitles movant to
 18 proceed under more lenient standard of Rule 6(b)(1)(A)). Counsel is far more
 19 likely to receive the extension by seeking it before the expiration. 1 *Moore's*
 20 *Federal Practice*, §6.06[2], p. 6-32 (Matthew Bender 3. ed. 2013). Indeed, this
 21 concept is contained in the Federal Rules of Civil Procedure. Compare Fed. R.
 22 Civ. P. 6(b)(1)(A) with Fed. R. Civ. P. 6(b)(1)(B). The old adage that it is better to
 23 beg for forgiveness than to plead for permission was rejected by the Federal Rules
 24 of Civil Procedure. *Id.*; see *Gray v. U.S. Steel Corp.*, 2012 U.S. Dist. LEXIS
 31834, at *11-12 (N.D. Ind. Mar. 9, 2012). Failure to follow this simple solution
 inevitably leads to additional delay, which is a scourge of modern civil litigation.
 25 *Geiserman v. MacDonald*, 893 F.2d 787, 791 (7th Cir. 1990). It behooves
 26 litigants, counsel and courts to remember a purpose of the Federal Rules of Civil
 27 Procedure is to seek a speedy resolution. Fed. R. Civ. P. 1.

28 In the case at bar, we are dealing with a pattern of disrespect from Reisner. The Defendant
 failed to cooperate in fashioning the parties' case management statement; simply failed to show
 for both case management conferences, the settlement conference, and failed to provide a 26.1

statement. The Court expressed exasperation in open Court with this pattern of malign neglect. (See, generally, Sworn Declaration of Carl Wescott, attached hereto as Exhibit "A").

In the view of the plaintiff, the Defendant simply lacks a defense and has decided to adopt pure dilatory tactics. Judge Johnston was correct to identify this strategy as "a scourge of Modern litigation". (For the Court's convenient reference, the Plaintiff has attached Judge Johnston's Opinion hereto as Exhibit "B"). The imposition of a Default Judgment – subject to prove-up of damages – is expressly authorized by the incorporation of Rule 37 (b) (2) (A) (ii) sanctions which in turn include the entry of a Default Judgment.

3. The Court's Authority is Not Limited to Rule 16


Alternatively and conjunctively, this Court possesses power to impose sanctions against parties for employing delaying tactics pursuant to 28 USC 1927 4.2. The Court also possesses the inherent power to coerce compliance with its Orders. *Chambers v. NASCO Inc.*, 501 US 32, 46 (1991). Finally, the Court can impose a Default under Federal Rule of Civil Procedure 55 (a) for "otherwise failing to defend". See Jessica Ruoff, Why Broadly Interpreting "Otherwise defend" Protects a Diligent Party's Rights and Encourages an Orderly and Efficient Judicial System, 88 St. John's Law Review 467 (June 2015) and cases cited therein.

4. Conclusion

This Court is fully justified in its exasperation at the Defendant's disrespect for the case management and discovery process. The Court has ample grounds and justification for imposing the sanction of a Default Judgment. The Plaintiff also asks for the award of appropriate sanctions under Rule 16 (F) (2)

1 RESPECTFULLY SUBMITTED

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Carl A. Wescott, *pro se*

PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT